No. 363

IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1923

EDWARD HINES YELLOW PINE TRUSTEES,

Petitioners

vs.

ANNA F. C. MARTIN, ET ALS, Respondents

STATEMENT AND BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CLAYTON D. POTTER,
HATHORN & WILLIAMS,
Attorneys for respondents.

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STATEMENT AND BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

In the statement of this case, as contained in the petition for writ of certiorari and the brief of counsel for petitioners, there is a wide difference from the statement of the case as contained in the opinion of the Circuit Court of Appeals, whose decision it is sought to have reviewed by this court on certiorari.

We think the statement of the case as contained in the opinion of the Circuit Court of Appeals is a fair and a correct statement of the case made by the record before that Court for review, and because we think the opinion

of the court contains a fair and a correct statement of the case, we adopt that statement of the case as our statement of the case, and we here quote in full the opinion of the court, which is in the following words:

> "The appellants as complainants below filed four bills separately on the chancery side of the Court against the individual defendants, describing pieces of property as follows: Anna F. C. Martin, the NE¼ of SE¼; F. C. Martin, SE¼ of SE¼; H. P. Lewis, SW¼ of NW¼; and George Lawrence, SE¼ of NW¼; all in Section 36, Twp. 2, South, of Range 15 West; praying in each bill to have the Court decree title in them and remove any claim of the defendant as a cloud upon their title. Each defendant answered the bill denying complainants title on various grounds and alleging title in himself or herself.
>
> "These suits were subsequetly consolidated and tried before the District Judge as one suit, upon the agreed statement of facts and documentary evidence, and a decree rendered whereby it was adjudged that the title to the lands was vested in the defendants and the prayers of the bills denied.
>
> "The agreed statement of facts among other things stipulated that the lands in question were acquired by the State of Mississippi from the United States by Act of Congress approved September 28th 1850; that whatever title complainants have depends upon the patent issued to the Pearl River Improvement & Navigation Company, by the State of Mississippi, June 27th 1871, and vested in the complainants by mense conveyances, the production of which is waived; that complainants acquired their title January 1st, 1918; That whatever title defend-

ants have was acquired through the patent issued by the State of Mississippi, December 7th, 1883, to Mose Mitchell, through mense conveyances, the production of which is waived.

"That the taxes on the land were paid by the predecessors in title of the defendants for the years 1892, 1903 and 1905; that the complainants or their predecessors in title paid the taxes for the remaining years from 1890 to 1922 inclusive, and that the parties do not know who paid such taxes prior to 1890.

"It is further admitted that the patent to the Pearl River Improvement and Navigation Company, under which complainants claim is the same patent involved in the cases of Southern Pine Co., vs. Hall, 105 Fed. 84, and Becker vs. Columbia Bank, 73 So. 798, but these particular lands were not involved in these suits; that there was a bond filed in the office of the Secretary of State purporting to be the bond required by the Act of April 8th, 1871 of the Legislature of the State of Mississippi, which bond is set out in words in the cases of Hardy vs. Hartman, 65 Miss. 505; Southern Pine Co. vs. Hall, and Becker vs. Columbia Bank, supra.

"Pursuant to this agreed statement of facts, a copy of the patent to the Pearl River Improvement & Navigation Company and a copy of the patent to Mose Mitchell were intruduced and filed in evidence.

"The District Judge in the trial and disposition of the cases followed the decisions of the Supreme Court of Mississippi in the construction of the Act of the Mississippi

Legislature of 1871, rather than the decision of the Circuit Court of Appeals in the Southern Pine Co. vs. Hall, supra.

"In the case of Hardy vs. Hartman, 65 Miss. 505, the Supreme Court of Mississippi in 1888 decided that the giving the bond required by Section 5 of the Act of 1871 incorporating the Pearl River Improvement & Navigation Company ,was a condition precedent to the issuance of the patent provided for in said Act; that this condition precedent had not been complied with before the patent, the basis of complainants' title, was issued to the company and therefore such patent was void and did not divest the title of the State.

"The bond referred to in the agreed statement of facts is set out in the statement of the above case, and is as follows:

'Bond.

'Pearl River Improvement and Navigation Company.

'Know all men by these presents, that we, Walter P. Billings, Samuel A. Vose, A. Warner, O. C. French, are held and firmly bound unto the State of Mississippi in the sum of Fifty thousand dollars, the payment of which well and truly to be made, we bind ourselves, our heirs and executors, jointly and severally, by these presents. The condition of the above bond is such, that whereas by an Act of the Legislature of the State of Mississippi, entitled, 'An Act to incorporate the Pearl River Improvement and Navigation Company, and for other purposes,' a company was incorporated called the Pearl River Im-

provement & Navigation Company, which company is charged with certain duties and bound by certain conditions in said Act specified. Now, if said company will well and truly perform, or cause to be performed, all the acts and things mention in said act of incorporation, and comply with all the terms and conditions in accordance with the tenor and meaning of said act, then this bond to be void, otherwise to remain in full force and effect.

'In witness whereof said persons have hereunto set their hands and seals this 7th day of April, 1871.

W. P. Billings (Seal)
(by S. A. Vose, his attorney)
S. A. Vose (Seal)
A. Warner (Seal)
O. C. French (Seal)

'Approved May 12th, 1871.

J. L. TLCORN, Governor.'

"The question of the validity of the patent to the Pearl River Improvement and Nav. igation Company, was again before that Court in Becker vs. Columbia Bank, 73 So. 798, when the Court again held the patent void and declared the former decision to be a rule of property in the State. Since the decision of this case, two other cases have been before the Supreme Court of Mississippi. In these cases the Court reversed the case awarding damages to the State and affirmed the chancery decree dismissing the bill. On suggestion of error seeking to have the Court declare that the distinction drawn in that

opion between that case and Tynes vs. Southern Pine Company, unsound, they say 'We are not concerned here with the correctness of the decision in Hardy vs. Hartman and the rule there applied, whether correct or not to titles derived through the patent issued to the Pearl River Improvement and Navigation Company, has become a rule of property and will not be departed from.'

"In the case of Southern Pine Co., vs. Hall, 105, Fed. 84, the Circuit Court of Appeals reached the conclusion that the bond was a compliance with the statute and the patent issued to the Pearl River Improvement & Navigation Company was valid. The Supreme Court of the United States refused a certiorari in this case.

"We have therefore the question whether the rule of title to real property as decided by the Supreme Court of the State of Msisissippi should be applied in this case as was done by the District Judge. We think that is the proper rule, and that there is no error in the decree. There cannot be two contradictory rules of title to real property dependent upon the statutes of a state. The construction of such statutes by the highest Court of the State is binding upon the Courts of the United States in cases not falling within some narrow exceptions.

"This rule of property has existed in the State of Mississippi since 1888, and being such it will be applied by this Court in deciding cases arising under the Statute.

"As said by the Supreme Court in the case of Jackson ex dem. St. John vs. Chew, 12 Wheat, 161, 'The inquiry is very much narrowed, by applying the rule which has uniformly governed this court, that where any principle of law, establishing a rule of real property, has been settled in the state courts, the same rule will be applied by this court, that would be applied by the state tribunals. This is a principle so obviously just, and so indispensibly necessary, under our system of government, that it cannot be lost sight of.'

"The same rule was applied in the case of James H. Suydam vs. Wm. H. Williamson, 24 Howard 427, and recognized by many decisions of the Supreme Court following.

"The decree of the District Court is AFFIRMED."

From the foregoing opinion and by an examination of the answer of each defendant to the bills of complaint it will be observed that all of the averments of title by complainants were specifically denied. No evidence was introduced by complainants in support of their title except the patent from the State of Mississippi to the Pearl River Improvement & Navigation Company. It was admitted by the agreed statement of facts that complainants owned such title, and such title only, as passed to the Pearl River Improvement & Navigation Company by this patent; that whatever title complainants have depends upon the said patent; and that complainants acquired heir title January 1, 1918.

It will be further observed that by the agreed statement of facts it was admitted that the patent to the Pearl River Improvement & Navigation Company, under which complainants claimed title, is the same patent involved in the cases of Southern Pine Co., v. Hall 105 Fed. 84, and

Becker v. Columbia Bank, 73 So. (Miss.) 798, but that these particular lands were not involved in these suits; that a bond was filed in the office of the Secretary of State purporting to be the bond required by the Act of the Legislature of the State of Mississippi approved April 8, 1871, which bond is set out in the cases of Hardy v. Hartman, 65 Miss., 505, and Southern Pine Company, v. Hall, supra, and Becker v. Columbia Bank, supra.

It will be further observed from the opinion of the Circuit Court of Appeals in the instant case that the Supreme Court of Mississippi held in 1888, in the case of Hardy v. Hartman, 65 Miss., 505, that the giving of the bond repuired by Section 5 of the Act of 1871 incorporating the Pearl River Improvement & Navigation Co., was a condition precedent to the issuance of the patent provided for in said act; that this condition precedent had not been complied with before the patent, which is the basis of complainants' title, was issued to the Company, and therefore such patent was void and did not divest the title of the State; that the question of the validity of the patent to the Pearl River Improvement & Navigation Company was again before the Mississippi Supreme Court in Becker v. Columbia Bank, 73 So. (Miss.) 798, when the court again held the patent void and declared its former decision in the case of Hardy v. Hartman to be a rule of property in the State; and that thereafter two other cases (Edward Hines Yellow Pine Trustees v. State of Mississippi and State of Mississippi v. Edward Hines Yellow Pine Trustees, 98 So. 158) were before the Supreme Court of Mississippi, wherein they say, in response to suggestion of error, "We are not concerned here with the correctness of the decision in Hardy v. Hartman and the rule there applied, whether correct or not to titles derived through the patent issued to the Pearl River Improvement & Navigation Company, has become a rule of property and will not be departed from."

It will be further observed that the only question made by the record in the instant case and presented to the District Court and to the Circuit Court of Appeals was the question whether the rule of title to real property dependent upon the statute of the State as construed and declared by the Supreme Court of Mississippi in the cases cited, supra, should be followed and applied by the Federal Court; or whether this rule of title should be disregarded, and a contradictory rule of title dependent upon said statute should be established by the Federal Court .

The Circuit Court of Appeals reached the conclusion that there cannot be two contradictory rules of title to real property dependent upon the statutes of a State; that the construction of such statutes by the highest court of the State is binding upon the Courts of the United States in cases not fallnig within some narrow exceptions; and that this rule of property has existed in the State of Mississippi since 1888, and being such it will be applied by the Federal Courts in deciding cases arising under the Statute.

BRIEF.

POINT I.

The petition in this case does not show any grounds justifying the issuance of a writ of certiorari.

The effect of the petition for certiorari in this case is to ask this Court to bring up for review the action of the Circuit Court of Appeals in following the settled course of decisions of the Supreme Court of Mississippi, existing since 1888, construing the statute of the State approved April 8, 1871, creating the Pearl River Improvement & Navigation Company, and fixing a rule of title to all lands claimed through the patent issued to the Pearl iver Improvement & Navigation Company under said statute.

The record in this case presents a clash of interest between private litigants over the title to land. There is no question of importance involved which it is in the public interest to have decided by this Court; and the case does not present a conflict in decision of the Circuit Courts of Appeals of the nine circuits.

The jurisdiction of this Court to review by certiorari final decisions of the Circuit Court of Appeals is exercised sparingly, and is never extended except in cases of peculiar gravity and general importance to the public, and in cases where there is a conflict in decisions of the Circuit Courts of Appeals of the nine circuits.

Layne & Bowler Corp. v. Western Well Works 261 U. S. 387, 67 L. Ed. 712;

Mangum Import Co. v. De Spoturno Coty. 262 U. S. 159, 67 L. Ed. 922;

Ex parte Lau Ow Bew, 12 Sup. Ct. 43, 141 U. S. 583, 35 L. Ed. 868;

In Re: Woods, 12 Sup. Ct. Rep. 417, 143 U. S. 202, 36 L. Ed. 868;

Lau Ow Bew v. U. S., 12 Sup. Ct. 517, 144 U. S. 47, 36 L. Ed. 340;

American Const. Co. v. Ry. Co., 13 Sup. Ct., 758, 148 U. S. 372, 37 L. Ed. 486;

The 3 Friends, 17 Sup. Ct. Rep., 495, 166 U. S. 141.

Forsyth v. Hammond, 17 Sup., Ct., 665, 166 U. S., 506, 41 L. Ed. 1095;

Fields v. U. S., 27 Sup. Ct., 543; 205 U. S., 292, 51 L Ed. 807;

McClelan v. Carland, 30 Sup. Ct., 501, 217 U. S. 268, 54 L. Ed. 762;

U. S. v. Rimer, 31 Sup. Ct., 596, 220 U. S. 547, 55 L. Ed. 578;

In the case of Magnum Import Co. v. De Spoturno Coty, supra, this Court said, speaking through Chief Justice TAFT:

> "The question how the court should exercise this power next arises. The jurisdiction to bring up cases by certiorari from the Circuit Court of Appeals was given for two purposes; first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that 80 per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ. When, therefore, after the petition is filed and before its submission, an application is made for a suspension of the judgment or decree of the Circuit Court of Appeals, a heavy burden rests on the applicant."

In the case of Layne & Bowler Corp. v. Western Well Works, supra, this Court said, speaking through Mr. Chief Justice TAFT:

> "It is manifest from this review of the conclusions in the two circuits as to the validity of the Layne patent and the proper construction to be put upon the 9th, 13th, and 20th claims, that they were really in harmony and not in conflict, and that there was no ground for our allowing the writ of certiorari to add to an already burdened docket. If it be suggested that as much effort and

time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlemet of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals. The present case certainly comes under neither head."

Manifestly the action of the Circuit Court of Appeals in following this settled course of decisions of the Supreme Court of Mississippi, extending over a period of nearly forty years without the discordant note of a dissenting opinion, construing the Act of April 8, 1871, and fixing a rule of property governing the title to all lands claimed under the patent issued to Pearl River Improvement & Navigation Company under said Act, does not present a case falling within the class which will be reviewed by this Court on certiorari.

Under the provisions of Section 128 of the Judicial Code the Judgment of the Ciruit Court of Appeals in this case is final. An examination of the petition for certiorari and the transcript of the record of the proceedings will disclose that no ground for review by certiorari is presented, but that this is a case of a defeated litigant seeking another hearing before this Court in a suit where final appellate jurisdiction is expressly conferred by law on the Circuit Court of Appeals.

POINT II.

The application for writ of certiorari is made too late.

Section 6 of the Act of September 6, 1916 (chap. 448

39 Stat. at L. 726, 727, Comp. Stat. Section 1228a, Fed. Stat. Anno. Supp. 1918, p. 422), directs:

> "That no writ of error, appeal, or writ of certiorari intended to bring up any cause for review by the Supreme Court shall be allowed or entertained unless duly applied for within three months after entry of the judgment or decree complained of."

The final decree of the Circuit Court of Appeals was entered in this case on January 16, 1924. The application for the writ of certiorari, therefore, must have been made on or before April 16, 1924, otherwise it would come too late. Toledo Scale Company v. Computing Scale Company, 261 U. S. 399, 67 L. Ed. 719.

We are in receipt of a letter from the Clerk of this Court, under date of April 19, 1924, wherein we are advised that the Clerk has received from petitioners certain papers in the case for use on the application for certiorari but the case had not been docketed because counsel had not complied with the necessary requirements up to that time. Our interpretation of this letter from the Clerk is that at the time of writing, April 19, 1924, no application for writ of certiorari had been made as required by law and the rules of this Court.

We respectfully submit that, if we have correctly interpreted this letter, the application was not made within three months after the entry of the final decree of the Circuit Court of Appeals sought to be reviewed; and that, therefore, this Court should not entertain the application for the writ.

POINT III.

The decision of the Circuit Court of Appeals sought to be reviwed on certiorari is correct.

In the case of Hardy v. Hartman, 65 Miss. 505, the Supreme Court of Mississippi construed the Act of April 8, 1871, creating the Pearl River Improvement & Navigation Company and held that the patent issued to said Company under this statue was void because the bond required by the statue was not executed and filed by the Company. In the case of Becker v. Columbia Bank, 73 So. (Miss.) 798, the Supreme Court of Mississippi again held that said patent was void for the reason that the bond required by the statute was never executed, and also held that the rule applied in Hardy v. Hartman, supra, was a rule of property governing all titles claimed through patents issued to Pearl River Improvement & Navigation Company under said statute. In the case of Edward Hines Yellow Pine Trustees v. State of Mississippi 98 So. (Miss.) 158, on suggestion of error, the Supreme Court of Mississippi again held that the decision in Hardy v. Hartman supra, and the rule there applied to titles derived through patents issued to the Pearl River Improvement & Navigation Company has become a rule of property and will not be now departed from.

There is an unbroken line of decisions by the Supreme Court of the United States, beginning with the case of Jackson Ex. Dem. St. John v. Chew, 12 Wheat. 153, (6 L. Ed. 583), establishing a rule which has uniformly governed the Federal Courts, that where any principle of law, establishing a rule of property, has been settled in the state court, the same rule will be applied by the Federal Courts that would be applied by the State Courts, and that this rule will govern the Federal Courts, whether the decisions of the State Court establishing a rule of property are grounded on the coustruction of the statutes of the State or form a part of the unwritten law of the

State. This rule has been reaffirmed and applied by the Supreme Court of the United States time and time again, and especially in the following cases:

Beauregard v. New Orleans, 18 How. 497 (15 L. Ed. 470);

Suydam v. Williamson 24 How. 427 (16 L. Ed. 742);

Nichols v. Levy 5 Wall. 433, (18 L. Ed. 596);

Williams v. Kirtland 13 Wall, 306 (20 L. Ed.);

Barrett v. Holmes 12 Otto 651 (26 L. Ed. 291);

Warburton v. White 176 U. S. 496 (44 L. Ed. 559);

Guffey v. Smith 237 U. S. 101 (59 L. Ed. 856);

Green v Neal 6 Peters 291 (8 L. Ed. 402)

Wade v. Travis County, 174 U. S. 508, 43 L. ed. 1064;

Bucher v. Cheshire R. Co., 125 U. S. 555, 31 L. ed. 795.

League v. Egery, 24 How. 264, 16 L. ed. 655;

Smith Purifier Co. v. McGroarty, 136 U. S. 237, 34 L. ed. 346;

Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 365;

Barker v. Eastman, 192 Fed. 659;

Highland Park Mfg. Co. v. Steele, 232 Fed. 10.

After a careful search, we have been unable to find a single case holding contrary to or even qualifying the rule that the Federal Courts will always conform their decisions to those of the State Courts, and will follow the

decisions of the State Courts, where those courts have, by a settled course of decisions, established rules of property affecting land titles, and especially where those rules of title arise out of the construction by the State Courts of the statutes upon which such titles depend. We have carefully examined all of the cases cited by counsel for petitioners, and none of those cases conflict with or qualify this rule. Such of the cases cited by counsel for petitioners as touch upon or speak of this rule expressly recognize it. In fact, there is no better statement of the rule to be found in any of the books than the statement and recognition of the rule in the case of Burgess v. Seligman, 107 U. S. 20, 27 L. Ed. 359, cited and relied on by counsel for petitioners.

Not only will the Federal Courts always conform their decisions to those of the State Courts in such cases, especially where such decisions involve a construction of statutes of the State upon which such titles depend; but the Federal Courts will go further and will overrule their own decisions in order to conform to the decisions of the State Courts fixing such rules of property in such cases. Green v. Neal, 6 Peters 291, 8 L. Ed. 402; Suydam v. Williamson, 24 How. 427, 16 L. Ed. 742.

POINT IV.

Petitioners not in position to rely upon Chapter 114 of Laws of Mississippi of 1875 as ratifying their title.

It is claimed by petitioners that this Court should review and reverse the decision of the Circuit Court of Appeals because they say now, and for the first time in this Court, that their title to the lands involved was approved and ratified by the Legislature of the State of Mississippi, chapter 114 of the Laws of Mississippi, approved April 19, 1873. This statue is set out in full as appendix "C" to the petition for certiorari at pages 35, 36, and 37 thereof.

This statute is a private Act of the Legislature. It was not pleaded, proven nor relied on in the trial Court; it was not raised nor relied on before the Circuit Court of Appeals; and it is first pleaded, proven, raised, and relied on in this Court on petition for certiorari and as a ground for asking this Court to review the case on certiorari and reverse the same.

Where a litigant relies on a private Act of the Legislature, he must plead it specially and must prove it. 1 Chitty's Pl. 238; 20 Encyc. Pl. & Prac. 595; 36 Cyc. 1238; Garlich v. Northern Pac. Ry. Co. 131 Fed. 837, 67 C. C. A. 237. Since petitioners neither pleaded, proved nor relied on this private Act in the trial Court, and did not raise or rely upon it in the Circuit Court of Appeals, they are not in position now to raise and rely upon the same by pleading, proving and relying on it for the first time on petition for certiorari to bring the case before this Court for review.

If petitioners expected to rely on this private Act of the Legislature as a ratification of their title, they should have pleaded it and proved it in the District Court and should have relied on it in the Circuit Court of Appeals.

If petitioners had pleaded and relied on this in the District Court, respondents would have had an opportunity to meet the issue by proper pleading and proof; the District Court would have been afforded an opportunity ot pass upon this issue under proper pleadings and proof; and the Circuit Court of Apeals would have been given an opportunity to review the decision of the District Court upon the same.

Manifestly petitioners are seeking to have this Court take judicial notice of this private Act of the Legislature pleaded and relied on for the first time by them in their petition for certiorari. This Court is a Court for

review. It will not permit litigants to frame their pleadings and offer their proof for the first time on an application for certiorari to review the case, or upon a review of the case on cetiorari; neither will the Court make petitioners' case other than they made it in the District Court by taking judicial notice of a private Act of the Legisla ture which petitioners did not choose to rely on in their pleadings. If this Court could or would in any case take judicial notice of a private Act of the Legislature of a State, the pleadings of the party relying upon it would have to present the same before resort would be had to judicial knowledge by the Court. Mining Co. v. McFadden, 180 U. S. 533, 45 L. Ed. 656; Oregon S. L. & W. N. R. Co v. Skottowe, 162 U. S. 490, 40 L. Ed. 1048. In Mining Co. v. McFadden, supra, this Court said:

> "But the Circuit Court could not make plaintiff's case other than they make it by taking judicial notice of facts which they did not choose to rely on in their pleadings. The averments brought no controversy in this regard into Court, in respect of which resort might be had to judicial knowledge. Thayer Treatise on Evidence, ch. VII; Oregon S. L. & W. N. R. Co., v. Skottowe, 162 U. S. 490, 40 L. Ed. 1048, 16 Sup. Ct. Rep. 869."

In this connection we also call to the attention of the Court that by the agreed statement of facts petitioners admit that the validity of their title is enirely dependent upon the patent issued to the Pearl River Improvement & Navigation Company under the Act of April 8, 1871, set out as appendix "B" to the petition for certiorari.

We respectfully submit, therefore, that we are not called upon now to meet an issue raised by petitioners for the first time in this Court on their application for certiorari,—an issue which they did not choose to make and rely upon in the District Court and in the Circuit Court of Appeals.

Irrespective, however, of the merits of the case, the petition for certiorari and the record accompanying same fail to present a case calling for the exercise of the jurisdiction of this Court to review by certiorari the decision of the Circuit Court of Appeals. We respectfully submit, therefore, that the petition ought to be denied.

Respectfully submitted,

CLAYTON D. POTTER.
HATHORN & WILLIAMS,
Attorneys for respondents.

We, the undersigned attorneys for respondents in the above styled cause, hereby certify that we have this day delivered to T. J. Wills, of counsel for petitioners, a true and correct copy of the foregoing statement and brief.

Signed this 30th day of April, 1924.

CLAYTON D. POTTER,
HATHORN & WILLIAMS,
Attorneys for respondents.

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(30,281)

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OCTOBER TERM, 1924
No. 363

EDWARD HINES YELLOW PINE TRUSTEES, PETITIONERS,

vs

ANNA F. C. MARTIN, F. C. MARTIN, H. P. LEWIS AND GEORGE LAWRENCE RESPONDENTS

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT AND BRIEF FOR RESPONDENTS

WILLIAM H. WATKINS,—Jackson, Miss.
FLEET C. HATHORN,—Hattiesburg, Miss.
HATHORN & WILLIAMS,—Poplarville, Miss.
Attorneys for Respondents.

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ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT AND BRIEF FOR RESPONDENTS

ABSTRACT OR STATEMENT OF THE CASE

Petitioners here, who were appellants in the Circuit Court of Appeals for the Fifth Circuit, filed suit on the equity side of the docket of the United States District Court for the Southern Division of the Southern District of Mississippi against the defendants there, who were appel-

lees in the Circuit Court of Appeals and who are respondents in this Court. The suits were four in number but were identical except for the different or several claims of ownership by each defendant to the separate parcels of land involved. The cases were consolidated by agreement on the hearing in the District Court, and as so consolidated were heard on appeal in the Circuit Court of Appeals, and as so consolidated are to be heard by this Court..

The purpose of each suit was to quiet and confirm title asserted by complainants, which claimed title originated under an alleged patent from the State of Mississippi to Pearl River Improvement & Navigation Company issue on June 27, 1871; and to cancel the asserted title of defendants, which asserted title originated under a patent from the State of Mississippi to Mose Mitchell issued on December 7, 1883.

On the hearing of the case, the District Court applied the rule announced in the case of Hardy Vs. Hartman, 65 Miss. 504, declared by the Supreme Court of Mississippi in the case of Becker Vs. Columbia Bank, 112 Miss. 819, 73 South. 798, and in the case of Edward Hines Yellow Pine Trustees vs. State Ex. Rel. Moore, 134 Miss. 533, 534, 98 South, 158, to be a rule of property, and also followed the rule announced by the Supreme Court of Mississippi in the case of Tynes Vs. Southern Pine Company, 100 Miss. 129, 54 South. 885, and held that the alleged patent to Pearl River Improvement and Navigation Company is void; and held that the patent to Mose Mitchell is valid; and dismissed the bills of complaint and decreed title to the land in defendants.

From the decree of the District Court dismissing the bills of complaint and adjudicating title to the land in defendants, the complainants appealed to the Circuit Court of Appeals for the Fifth Circuit. The Circuit Court of

Appeals applied the rule of property fixed by the Supreme Court of Mississippi in Hardy Vs. Hartman, Supra, and applied in Becker Vs. Columbia Bank, Supra, and in Edward Hines Yellow Pine Trustees Vs. State, Ex. Rel Moore, Supra, and affirmed the decree of the District Court. The opinion of the Circuit Court of Appeals affirming said decree of the District Court is reported in 296 Fed. Rep. 442; and the said opinion is set out in full at pages 79 to 82 of the record in the case at bar.

STATEMENT OF THE PLEADINGS

The complainants filed in each suit their bill of complaint wherein they derainged title to the land in each case as follows: (a) a donation from the United States to the State of Mississippi under act of congress approved September 28, 1850, commonly called the "Swamp Land Act": (b) patent from the State of Mississippi to Pearl River Improvement and Navigation Company dated June 27, 1871, and issued in virtue of an act of the legislature of Mississippi approved April 8, 1871; (c) deed from Pearl River Improvement & Navigation Company to M. S. Baldwin dated November 20, 1872; (d) deed from Samuel A Vose, attorney in fact for M. S. Baldwin to Israel Hall dated April 17, 1873; (e) deed from Israel Hall to Charlotte H. Eastman dated about the year 1887 and unrecorded (f) Quit claim deed from Olivia B. Hall, sole legatee of Israel Hall, to Charlotte H. Eastman dated July 23, 1900, and executed by said Olivia B. Hall as such, to take the place of said unrecorded deed from Israel Hall to Charlotte H. Eastman; (g) deed from M. S. Baldwin to Charlotte H. Eastman dated May 13, 1904, and executed to take the place of said deed from Samuel A. Vose, attorney in fact for M. S. Baldwin, to Israel Hall; (h) deed from Charlotte H. Eastman and Sidney C. Eastman, her husband, to Wyatt Lumber Company dated July 5, 1905; (1) quit claim deed from Wyatt

Lumber Company to the Complainant dated January 1, 1918. (R. 1 and 2, R. 8 and 9; R. 15 and 16; R. 23 and 24).

The complainants averred in each suit that each defendant claimed to own a forty acre tract of the land by a title set out in the bill of complaint as follows: a patent from the State of Mississippi to Mose Mitchell dated December 7, 1883; deed from Mose Mitchell to S. L. Woolridge dated December 27, 1883; a deed from S. L. Woolridge to Eugene Martin dated January 23, 1885; deed Eugene Martin to J. G. Barrett dated January 23, 1885; deed from J. G. Barrett to Henry Clifton Rodes dated July 21, 1888; deed from Henry Clifton Rodes to Southern Pine Company dated August 6, 1889. As to the forty acre tract claimed by the defendant, Anna F. C. Martin, the bill averred that the Southern Pine Company conveyed the same to her by a deed dated January 26, 1909. As to the forty acre tract claimed by the defendant, F. C. Martin, the bill averred that the Southern Pine Company conveyed the same to him by a deed dated January 26, 1909. As to the forty acre tract claimed by the defenant, H. P. Lewis, the bill averred that the Southern Pine Company conveyed the same to D. W. Blake by a deed dated January 26, 1909; and that said D. W. Blake conveyed the same to the defendant, H. P. Lewis, by a deed dated June 24, 1920. As to the forty acre tract claimed by the defendant, George Lawrence, the bill averred that the Southern Pine Company conveyed the same to Cecile Dowling by a deed dated January 26, 1909; and that said Cecile Dowling conveyed the same to the defendant, George Lawrence, by a deed dated June 12, 1920. (R. 2 and 3; R. 10; R. 17; R. 24.)

The complainants averred in each suit that in the year 1905 there was litigation in the District Court of the United States for the Southern Division of the Southern District of Mississippi between the Southern Pine Company and Olivia B. Hall, who it was claimed was complainant's predecessor in title, in which litigation the

title of said Olivia B. Hall was upheld by the decision of the Circuit Court of Appeals for the Fifth Circuit, as reported in 105 Fed. page 84; which litigation it is claimed was concerning lands and titles similar to those under which the lands here in controversy are held and claimed; and complainants averred that the lands involved in the suit at bar were, through inadvertance or mistake, left out of the pleadings and decree in said controversy. (R. 3; R. 10 and 11; R. 18; R. 25.)

The complainants averred in each suit that they and their alleged predecessors in claim of title were purchasers for value. (R. 7; R. 14; R. 21; R. 28)

There were other averments in the bill which are immaterial to be noted here.

The defendant in each suit filed a sworn answer. Each defendant in his answer denied the derainment of title of the complainants, except as to the grant of the land from the United States to the State of Mississippi under the act of September 28, 1850, which grant was admitted by defendants. The answers admitted that the defendants claimed title to the land under the patent to Mose Mitchell and the deeds set out in the bill of complaint and therein alleged to be the chain of title under which said defendants claimed title to the land. The answers admitted that there had been litigation between Olivia B. Hall and Southern Pine Company; but expressly denied that this litigation affected or involved the title to the land described in the bills of complaint; and expressly denied that the litigation in said former suit was concerning land and titles similar to those under which the land here in controversy are held and claimed; and expressly denied that the lands here involved were through inadvertance or mistake, left out of the pleadings and decree in said former controversy. The answers also denied that the complainants and their alleged predecessors in claim of title were purchasers for value. (R. 29 to 34; R. 39 to 44; R. 48 to 53; R. 57 to 62.)

In addition to these denials, each answer avers that the Supreme Court of the State of Mississippi, in the case of Hardy V. Hartman, reported in 65 Miss. 504, and also in the case of Becker Vs. Columbia Bank, reported in 112 Miss. 819, construed the patent issued to the Pearl River Improvement & Navigation Company under the act of the legislature of Mississippi approved Aril 8, 1871, and held that said patent was void because it did not appear from the record that the bond required of the Pearl River Improvement & Navigation Company by the said statute under which the patent was sisued had been executed; and that the decision of the Supreme Court of Mississippi in the case of Hardy V. Hartman, Supra, had become a rule of property and had been so declared by the Supreme Court of Mississippi in the case of Becker V. Columbia Bank, supra, as to all title sclaimed under a patent to the said Pearl River Improvement & Navigation Company, and that all parties acquiring property in the state of Mississipi had a right to rely on said rule of property, and that for this reason the claim of title being asserted by complainants to the lands involved in this suit based upon the patent to the Pearl River Improvement & Navigation Company issued in virtue of the assumed authority of said statute is void. (R. 36 and 37; R. 45 and 46; R. 55; R. 64.)

The answer in each case also averred that by section 6, article 8, of the constitution of Mississippi of 1868 (ratified December 1, 1869) a common school fund was established to consist of the proceeds of the sale of the swamp land granted to the state under the act of Congress approved September 28, 1850, "except the swamp land lying and situated on Pearl River, in the counties of Hancock, Marion, Lawrence, Simpson, and Copiah"; that at the time of the enactment of the statute creating the Pearl River Improvement & Navigation Company and at the time of the issuance of said patent to the Pearl River Improvement & Navigation Company under the assumed authority of said statute, the said provision of the constitution was in full force and effect, and said patent was

violative of this provision of the constitution and was void to the lands involved in this suit for the reason that these lands are neither on nor near Pearl River, but are remotely situated from Pearl River, are more than 18 miles east of Pearl River and lie east of the range of hills that divide the watershed of Pearl River from that of Wolf River, and actually lie east of Wolf River upon a tributary of Wolf River flowing into it from the east; that the lands involved in this suit were not authorized to be patented to the Pearl River Improvement & Navigation Company, because not located on Pearl River, but that the same were a part of the lands set apart by the constitution of 1868 (ratified December 1, 1869) to be sold for school purposes. The answers further averred that the Supreme Court of Mississippi, in the case of Tynes V. Southern Pine Company, reported in 100 Miss. 129, in construing a patent issued to the Pearl River Improvement & Navigation Company under said statute for swamp lands which were not located on Pearl River, held that the patent was void as to such lands for the reason that said lands were not located on Pearl River, and the legislature of the state of Mississippi was prohibited by section 6, article 8 of the constitution of 1868 (ratified December 1, 1869), from donating to anybody for any purpose the swamp and overflowed lands not situated on Pearl River. (R. 35 and 36; R. 44 and 45; R. 54 and 55; R. 63 and 64.)

STATEMENT OF FACTS

On the trial of the case in the District Court, no evidence was offered on the issues jointed except (1) an agreed statement of facts (R. 67 to 71), the substance of which is hereinafter set out; and (2) the patent from the State of Mississippi to Pearl River Improvement and Navigation Company (R. 71 and 72); and (3) the patent from the State of Mississippi to Mose Mitchell (R. 73); and a map of Pearl River County (Referred to at page

74 of the Record, but not therein copied.)

The agreed statement of facts signed by the parties and offered in evidence contained the following admissions: (1) That the State of Mississippi acquired title to the lands involved in this suit under the act of congress approved September 28, 1850, and the same were owned by the state at the time of the enactment of Chapter 34 Laws of Mississippi of 1852, approved March 12, 1852; (2) that whatever title, if any, to said lands was vested in the Pearl River Improvement & Navigation Company by the patent offered in evidence by complainants passed to and is now claimed by complainants by mesne conveyances from Pearl River Improvement & Navigation Company to complainants, and that complainants acquired their claim to the land by a deed dated January 1, 1918; (3) that whatever title, if any, to said land was vested in Mose Mitchell by the patent offered in evidence by defendants passed to and is now claimed by the defendants by mesne conveyances from said Mose Mitchell to defendants. and that each defendant acquired his claim to the particular land claimed as follows: Anna F. C. Martin by deed dated January 26, 1909; and F. C. Martin by deed dated January 26, 1909, and H. P. Lewis by deed dated June 14, 1920, and George Lawrence by deed dated June 12, 1920; (4) there was an agreement showing diversity of citizenship of complainants with defendants, and that the lands in each case were worth more than $3,000.00; (6) there was an agreement showing the location of the lands as to County, etc.; (7) there was an agreement showing that the lands involved in this suit were located on Wolf River, outside the Pearl River watershed and about 20 miles from Pearl River, etc: (8) there was an agreement relative to the disposition of certain lands within a mile of Pearl River, etc.; (9) it was agreed, among other things, that all lands in Pearl River County which were patented to the Pearl River Improvement & Navigation Company under the act ap-

proved April 8, 1871, creating said company, were afterwards sold by the State of Mississippi and patented to divers persons under the general laws of the state providing for the disposal of the swamp land; (10) it was agreed that a copy of the map of Pearl River County, a copy of patent to Pearl River Improvement & Navigation Company and a copy of patent to Mose Mitchell might be introduced in evidence and considered as part of the record, subject only to objection for incompetency or irrelevancy; (11) it was agreed that the patent to Pearl River Improvement & Navigation Company offered in evidence by complainants is the same patent which was involved in the case of Southern Pine Company v. Hall, reported in 105 Fed. Rep. page 84, and in the case of Becker v. Columbia Bank, reported in 112 Miss. 819, but that the lands involved in the present litigation were not involved in either of these suits; (12) it was agreed that there is not on file with any officer of the state of Mississippi either a bond or any evidence of the filing of a bond required by the act of the legislature of Mississippi approved April 8, 1871, creating the Pearl River Improvement & Navigation Company, but that there was at one time on file in the office of the secretary of state a bond purporting to be the bond required by said act of April 8. 1871, which is the same bond referred to an set out **per haec verba** in the case of Hardy V. Hartman, Supra, as reported in 65 Miss. at page 505, and in the case of Southern Pine Company V. Hall, Supra, and also referred to in Becker V. Columbia Bank, Supra; (13) it was agreed that every issue of law and fact in each of said four suits is the same and will be settled by one trial of the four suits together, except such difference, if any, as might arise out of the difference in the dates on which each defendant acquired his deed to the land involved in each separate suit, and that either party feeling aggrieved at the decree entered in any one of the four cases might appeal; and (14-) it was agreed that the agreed statement of facts, and the documentary evidence therein provided to be introduced, together with the pleadings in each case,

shall constitute the record upon which the four cases are to be tried, and that the same shall be tried without a stenographer, and that it will not be necessary to take a bill of exceptions for the purpose of getting the said documentary evidence and the agreed statement of facts incorporated into the record for an appeal, and that the agreed statement of facts together with the documentary evidence referred to therein, with the consent of the court given in open court, is made a part of the record in all four cases.

ARGUMENT

From the foregoing abstract or statement of the case, it is to be noted that the case at bar was tried on bill and answer, agreed statement of facts and the documentary evidence referred to therein.

Under these pleadings and this agreed statement of facts and this documentary evidence, the question presented for decision by the District Court and the question presented for decision by the Circuit Court of Appeals and the question presented for decision by this Court, if it is to be held upon further consideration that the writ of certiorari was not improvidently granted is whether the Federal Courts will follow the decisions of the Supreme Court of Mississippi and apply in this case (a) the rule applied by the state court in the case of Hardy v. Hartman 65 Miss. 504, and in the case of Becker Vs. Columbia Bank, 112 Miss. 819, and in the case of Edward Hines Yellow Pine Trustees Vs. State Ex. Rel. Moore, 134 Miss. 533, 534, holding that a patent issued to the Pearl River Improvement & Navigation Company under the Act of the Mississippi legislature approved April 8, 1871, is void because the bond required by the statute was never executed, and fixing a rule of real property governing all titles claimed through patents issued to the Pearl River Improvement & Naviga-

tion Company under said statue; and (b) whether the Federal Courts will also follow the rule announced by the Supreme Court of Mississippi in the case of Tynes Vs. Southern Pine Company 100 Miss. 129, holding that a patent issued to the Pearl River Improvement & Navigation Company under Act of April 8, 1871, for lands not situated on Pearl River is void because issued in violation of Section 6 Article 8, of the constitution of Mississippi of 1868 (Ratified December 1, 1869).

(a) RULE APPLIED IN HARDY VS. HARTMAN, 65 MISSISSIPPI, 504.

In the case of Hardy V. Hartman, Supra, the Supreme Court of Mississippi construed the act of the Mississippi Legislature approved April 8, 1871, creating the Pearl River Improvement & Navigation Company. (Mississippi Laws 1871, 482, 486.) The portion of the Legislative Act brought under review by the Court in that case was section 5 thereof which reads as follows:

> "Sec. 5 **Be it further enacted That** said company shall expend in the improvement of said river and in the navigation thereof, ten percentum the first year, of the value of the property referred to in the preceding section, and that the whole value of said property shall be expended for the purpose specified in this charter, within five years from the passage of this act. That said company shall, within sixty days after the passage of this Act, file in the office of the Secretary of State a bond in the sum of fifty thousand dollars, with two or more good securities, who shall make oath that they are worth the penalty of the bond over and above all liabilities and exemptions, which securities shall reside in this state, to

> be approved by the Governor, and upon the approval and filing of said bond, said Secretary of State shall, from time to time, as demanded by said company, make out a patent or patents for said land to said company, which patent or patents shall be signed by the Governor and countersigned by the Secretary of State, which patents shall vest fee simple of said lands in this Company: * * * *

The Court held in Hardy V. Hartman, supra, that a patent issued to the Pearl River Improvement & Navigation Company under said statute was void for the reason that it did not appear from the record that the bond required of the Pearl River Improvement & Navigation Company by said statute, under the assumed authority of which the patent was issued, had been executed. In that case a bond was introduced in evidence, which is set out in full in the reported case in 65 Miss. at page 504. The Supreme Court of Mississippi held that this bond was not the bond required by the statute; and held for that reason that a patent issued to the Pearl River Improvement & Navigation Company under the assumed authority of the statute was void.

The agreed statement of facts in the case at bar shows that there was a document purporting to be the bond required by the statute filed in the office of the Secretary of state and that this was the same bond as that under consideration in the case of **Hardy v. Hartman, supra,** and **Becker v. Columbia Bank, supra,** and in the case of **Southern Pine Company v. Hall,** 105 Fed. 84; and the agreed statement of facts further shows that the patent in the case at bar is the same patent involved in the case of **Becker v. Columbia Bank, supra,** and in the case of **Southern Pine Company v. Hall, supra.**

In the case of Becker v. Columbia Bank, supra, the Supreme Court of Mississippi held that the patent issued

to the Pearl River Improvement & Navigation Company was void for the reason that the bond required by the statute was never executed; and the court further held that the rule applied in the case of **Hardy v. Hartman, supra,** was a rule of property governing all titles claimed under patents issued to Pearl River Improvement & Navigation Company under said statute. In this Becker case the court say:

> "Without setting out the pleadings, the conflicting chains of title, or evidence in full, we think it well to state that the disposition of this case is controlled by **Hardy v. Hartman,** 65 Miss. 505 4 South 545 The decision of this court in the Hardy-Hartman case has been the subject of attack more than once, and this court has uniformly declined to overrule that case. The decision established a rule of property, which should not now be disturbed. The decision was rendered by eminent jurists, who stated that:
>
> 'The proposition is too plain for agrument that, if a patent issued for the land without these conditions being complied with, it was void.'
>
> The condition referred to by the court was that condition expressly provided by the statute that:
>
> 'Upon the approval and filing of said bond, said secretary of state shall, from time to time as demanded by said company, make out a patent or patents.'
>
> The bond required, according to the previous decision of our court, was not executed. It is contended by counsel for ap-

pellant that a different construction has been placed upon this act by the Federal Courts, and that there should be uniformity of decision. It is elementary that this court, above all others, has the right to construe the statutes of our own state.

It is contended by counsel that the record in this case does not show noncompliance in the filing of the bond required. The record does show an agreement dictated upon the trial of the case that the bond executed was the same bond shown by the record in the Hardy-Hartman Case. It is true that the record in this case shows the issuance of a patent to the Pearl River Improvement & Navigation Company. The title thus attempted to be conveyed by this patent is now held by the appellants, and, if the bond required was not given, this title in the hands of appellants cannot be upheld. This is a vital defect in appellants' case, which requires an affirmance of the decree entered by the trial court."

In the case of **Edward Hines Yellow Pine Trustees v. State Ex. Rel. Moore** 134, Miss, 533, 534, the supreme court of Mississippi, in an opinion on suggestion of error, again held the rule applied in **Hardy v. Hartman, supra,** to be a rule of property which controls all titles claimed under patents issued to Pearl River Improvement & Navigation Company under said statute. In this case the court say:

"Two propositions are particularly stressed on the suggestion of error:

1. That in applying the rule that a 'patent' to public land carries with it the presumption that all of the legal prerequi-

> sites necessary to its issuance have been 'comlied with,' in the absence from the record of the list of lands required by Section 7 Chapter 34, Laws of 1852, to be furnished by the Secretary of State to the Commissioners of the Southern District of Pearl River, we have necessarily overruled Hardy v. Hartman 65 Miss. 509, 4 South. 545, wherein it was held that a patent issued to the Pearl River Improvement & Navigation Company was void for the reason that it did not appear from the record that the bond required of the Pearl River Improvement & Navigation Company by the statute under which the patent was issued had been executed. * * * * *
>
> We are not here concerned with the correctness of the decision in **Hardy v. Hartma, supra,** and the rule therein applied. whether correct or not, to titles derived through patents issued to the Pearl River Improvement & Navigation Company has become a rule of property and will not be now departed from.

The question of the validity of the patent to the Pearl River Improvement & Navigation Company, issued under this statute, appears to have been before the Mississippi supreme court a number of times after the decision of the court in **Hardy v. Hartman, supra,** and before the decision in Becker v. Columbia Bank, **supra.** This is indicated by the following quotation taken from the opinion of the court in the last cited case:

> "The decision of this court in the Hardy-Hartman case has been the subject of attack more than once, and this court has uniformly declined to overrule that case."

This question was before the supreme court of Mississippi again so recently as February 4, 1924, in the case of Edward Hines Yellow Pine Trustees V. F. C. Martin, reported in Vol. 99 page 825 of Southern Reporter but not reported in the official state reports, wherein the court held, by affirming **per curiam** the judgment of the lower court, that the said patent is void. The appellants in that case are the same persons as the petitioners in the case at bar, and the appellee in that case is one of the persons who is a respondent in the case at bar.

These decisions of the supreme court of Mississippi, extending over a period of nearly forty years without the discordant note of a dissenting opinion, have set at rest forever, in the state court, the question that a patent issued to the Pearl River Improvement & Navigation Company under this statute (Act of Mississippi Legislature approved April 8, 1871) is void because the bond required by that statute was never executed. These decisions, extending over this long period of years, have conclusively established a rule of real property governing all titles claimed through patent issued to the Pearl River Improvement & Navigation Company under this statute.

If the case at bar were before the supreme court of Mississippi, there can be no question but that the state court would follow these former decisions establishing this rule of property, and would hold that the title of complainants derived through the patent to the Pearl River Improvement & Navigation Company is void.

Having thus shown the construction placed upon this statute by the Supreme Court of Mississippi, and the rule of property established by the decisions of that court governing these Pearl River Improvement & Navigation Company titles, we now come to the precise question for decision in the case at bar, which is whether the Federal Court will follow in this case this unbroken line of decisions by the Supreme Court of Mississippi dating back to 1888, construing this statute and establishing this rule of property.

THE FEDERAL COURTS FOLLOW AND APPLY THE LAWS AND RULES OF REAL PROPERTY ESTABLISHED BY THE COURTS OF THE STATE WHERE THE LAND IS SITUATED.

There is an unbroken line of decisions by the Supreme Court of the United States, beginning with the early decisions of that court, establishing a rule which has uniformly governed the Federal Courts, that where any principle of law, establishing a rule of property, has been settled in the state courts, the same rule will be applied by the Federal Courts that would be applied by the State Courts, whether the decisions of the State Court establishing a rule of property are grounded on the construction of the statutes of the State or form a part of the unwritten law of the State. This rule has been reaffirmed and applied by the Supreme Court of the United States time and time again, and especially in the following cases:

Jackson Ex. , Dem. St. John v. Chew 12 Wheat. 153, (6 L. ed. 583);

Suydam v. Williamson 24 How. 427 (16 L. ed. 742);

Walker v. State ..Commissioners 17 Wall. 648, (21 L. ed. 744);

Green v. Neal 6 Peters 291 (8 L. Ed. 402)

William v. Kirkland, 13 Wall, 306

Barrett v. Holmes, 12 Otto 651 (26 L. ed. 291);

Wraburton v. White 176 U. S. 496 (44 L. ed. 559);

League v. Egery, 24 How. 264 (16 L. ed 655);

Bucher v. Cheshire R. Co. 125 U. S. 555,

(31 L. ed. 795);

Burgess v. Seligman, 107 U. S. 20 (27 L. ed. 365)

Beauregard v. New Orleans, 18 How. 497, (15 L. ed. 470);

Smith Purefier Co. v. McGroarty, 136 U. S. 237 (34 L. ed. 346);

Guffey v. Smith, 237 U. S. 101 (59 L. ed.) 856);

Gormerly v. Clark, 134 U. S. 338 (33 L. ed. 909);

Waring v. Jackson, 1 Peters 570 (7 L. ed. 266);

Hinde v. Vattier, 5 Peters 398 (8 L. ed. 168)

Elmendorf v. Taylor, 10 Wheat. 152 (6 L. ed 289);

Christy v. Pridgeon, 4 Wall. 196 (18 L. ed. 322);

United States of America Emigrant Co. v. Adams County 100 U. S. 61 (25 L. ed. 563);

Heath v. Wallace 138 U. S. 573, (34 L. ed. 1063)

In the case of **Jackson, Ex. Dem. St. John vs. Chew, supra,** the Supreme Court of the United States say:

"The inquiry is very much narrowed by applying the rule which has uniformly governed this Court, that where any principle of law, establishing a rule of real property, has been settled in the State Courts, the same rule will be applied by this Court that would be applied by the State tribunal.

"This is a principle so obviously just, and so indispensably necessary under our system of government, that it cannot be lost sight of.

"After such a settled course of decisions, and two of them in the highest court of law in the State, upon the very clause in the will now under consideration, deciding that Joseph Eden did not take an estate tail, a contrary decision by this Court would present a conflict between the State Courts and those of the United States, productive of incalculable mischief. If, after such an uninterrupted series of decisions for twenty years, this question is not at rest in New York, it is difficult to say when any question can be so considered. And it will be seen by reference to the decisions of this court, that to establish the contrary doctrine here, would be repugnant to the principles which have always governed this Court in like cases.

"It has been urged, however, at the bar, that this Court applies this principle only to state constructions of their own statutes. It is true, that many of the cases in which this Court has deemed itself bound to conform to state decisions, have arisen on the construction of statutes. But the same rule has been extended to other cases; and there can be no good reason assigned why it should not be, when it is applying settled rules of real property. This Court adopts the state decisions, because they settle the law applicable to the case; and the reasons assigned for this course, apply as well to rules of construction growing out of the common law, as the statute law of

the state when applied to the title of lands. And such a course is indispensable, in order to preserve uniformity, otherwise the peculiar constitution of the judicial tribunals of the states and of the United States, would be productive of the greatest mischief and confusion. * * * * *

"And whether these rules of land titles grow out of the statutes of a state, or principles of the common law adopted and applied to such titles can make no difference. There is the same necessity and fitness in preserving uniformity of decision in the one case as in the other. So, also, in the cases of **Polk's Lessee v. Wendal,** 9 Cranch, 98, and **Thatcher v. Powell,** 6 Wheat. Rep. 127, the construction of state statutes respecting real property was under consideration; and the Courts say they will adopt, and be governed by, the state construction, when that is settled, and can be ascertained, especially where the title to lands is in question." * * * * *

"After such a series of adjudications for such a length of time, in the state courts, upon the very point now before us, and relating to a rule of landed property in that state, we do not feel ourselves at liberty to treat it as an open question."

In the case of **Walker v. State Commissioners supra,** the Supreme Court of the United States say:

"It is not for us to express any opinion as to what would be our construction of the act had the Supreme Court of the State never spoken on the subject. In the con-

struction of the statutes of a state, and especially those affecting titles to real property, where no Federal question arises this court follows the adjudications of the highest court of the state. Its interpretation is accepted as the true interpretation, whatever may be our opinion of its original soundness. It becomes a part of the statute, as much so as if incorporated into the body of it, and in following the statute as thus interpreted we only apply to a local question the law of the place. As has been often remarked, infinite mischief would result if, in construing state statutes affecting titles to real property, where no Federal question is involved, a different rule were adopted by the Federal tribunal from that of the state courts."

The case of Suydam v. Williamson, supra, is a case strikingly similar to the case at bar. In that case it appears that the Federal Court had held to be invalid title to certain lands in the state of New York, which decision was in conflict with a prior decision of the Courts of New York. Afterwards, the New York Courts continued to follow their own decision and expressly refused to follow the conflicting decision of the United States Supreme Court, just as the Supreme Court of Mississippi refused in Becker v. Columbia Bank supra, to follow the United States Circuit Court of Appeals in the case of **Southern Pine Co., v. Hall, supra, and** followed their own decision in the case of **Hardy v. Hartman, supra.** And in this situation the Supreme Court of the United States changed its former decision and followed the New York Courts.

In this case of **Suydam v. Wiliamson, supra,** the Supreme Court of the United States say:

"And the question is now presented to

this court, whether they shoud adhere to their own opinion as expressed in the cases of 8 Howard, or acknowledge the authority of the Courts of New York to settle finally the contest upon this title. * * * * *

"In the case of **Arguello v. United States,** 18 How. 539, this court determined that the colonization regulations of Mexico, of 1824 and 1828, did not prohibit the settlement of the littoral or coast leagues by natives. under the authority of the governor of California, and without the consent of the Central government in Mexico. The same question was presented in the case of **League v. Egery,** 24 How. 264, at this term, from the District Court of the United States in Texas, in reference to the coast leagues in that State. This Court found a contrary opinion had prevailed in the courts of that state, and had become a rule of property there, and without re-examining their own opinion or making any attempt to account for or to reconcile the difference, without any hesitation applied the rule adopted in Texas to the determination of controversies existing there.

"The cases reported in 8 Howard, referred to, came before this Court upon a division of opinion between the experienced judges of the Circuit Court of the Southern District of New York. The authority of Clark v. Surlay was thus impugned in that tribunal. The decision in the court of errors was far from being unanimous; nor was the dissent in that tribunal feeble or equivocal.

"The majority of this court were con-

vinced that the question might be examined anew, and that their answers were accordant with the opinion of the minority in the court of errors. But in the present case there is no room for doubt as to what the settled opinion of the courts of New York is in reference to this title and, therefore, no occasion for any hesitation concerning the obligation we have to perform. The Circuit Court decided adversely to the defendant.

"Its judgment is reversed and the cause remanded for further proceedings." (Italics ours)

In the case of **Green v. Neal, supra,** the Supreme Court of the United States over-ruled two of its own decisions in order to conform its decision in this Green case to the decisions of the state court fixing and establishing a rule of property. In over-ruling its former decisions, the Supreme Court of the United States say:

"Here is a judicial conflict, arising from two rules of property in the same state, and the consequences are not only deeply injurious to the citizens of the state, but calcuated to engender lasting discontents. It is therefore essential to the interests of the country, and to the harmony of the judicial action of the Federal and State governments, that there should be but one rule of property in a state.

"As it appears to this Court that the construction of the statute of limitatons is now well settled, differently from what was supposed to be the rule at the time this Court decided the case of **Patton's Lessee v. Easton,** and the case of **Powell's Lessee**

v. Green; and as the instructions of the Circuit Court were governed by these decisions and not by the settled law of the state, the judgment must be reversed, and the cause remanded for further proceedings."

In the case of **William v. Kirkland, supra,** the Supreme Court of the United States say:

> "This construction of a state of law upon a question affecting the titles to real property in the State by its highest court, is binding upon the Federal Court."

In the case of **Barrett v. Holmes, supra the Supreme** Court of the United States say:

> "By these decisions the Supreme Court of the state has established a rule of property in the State of Iowa, which is binding on this and other courts of the United States."

In the case of **League v. Egery, supra,** the Supreme Court of the United States say:

> "In accordance with well established principles in this Court, we accept this uniform and stable body of judicial decisions from the Court of last resort of the state in which the property is situated, and in which the transactions which form the subject of this litigation took place, as conclusive testimony of the rule of action prescribed by the authorities of the state, as applicable to their interpretation and adjustment. We do not inquire whether a more suitable rule might not have been adopted, nor whether the arguments which lead to its adoption were forcible or just. We receive the de-

cisions, having the character that is mentioned in the extract we have made from the opinion of the Supreme Court of Texas as having a binding force almost equivalent to positive law. Such being our conclusion in respect to this grant, we must sanction the judgment of the District Court that denies to it validity."

In the case of **Bucher v. Chesire R. Co.**, supra, the Supreme Court of the United States say:

> "It is also well settled that where a course of decisions, whether founded upon statutes or not, have become rules of property as laid down by the highest courts of the state, by which is meant those rules governing the descent, transfer, or sale of property, and the rules which affect the title and possession thereto, are to be treated as laws of the state by the Federal Court."

In the case of **Burgess v. Seligman, supra,** (cited and relied upon by counsel for Petitioners as authority) the Supreme Court of the United States say:

> "The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which becomes **rules of property** and action in the state, and have all the effects of law, and which it would be **wrong to disturb**... This is especially true with regard to the law of **real estate** and the construction of state

> **Constitutions and statutes... Such established rules are always regarded by the Federal Courts,** no less than by the State Courts themselves, as authoritiative declarations of what the law is."
>
> (Italics ours)

In the case of **Warburton v. White supra,** in answer to the contention there made that because the rights under the contract had been acquired prior to the decision of the State Court fixing the rule of property, that therefore the United States Court could and ought to exercise its independent judgment and not feel bound by the rule fixed by the State Court, the Supreme Court of the United States, in disposing of this contention, say:

> "The rule is subject to a limitation which is, that where state decisions have interpreted state laws governing real property or controlling relations which are essentially of a domestic and state nature, in other words, where the state decisions called upon to interpret the state law will, establish a rule of property, this court when if it is possible to do so, in the discharge of its duty, adopt and follow the settled rule of construction affixed by the state court of last resort to the statutes of the state, and thus conform to the rule of property within the state. It is undoubted that this rule obtains, even although the decisions of the state court, from which the rule of property arises, may have been for the first time announced subsequent to the period when a particular contract was entered into. **Burgess v. Seligman,** 107 U. S. 20, 34, 27 L. ed. 359, 365, 2 Sup Ct. Rept. 10; **Miller v. Ammon,** 145 U. S. 423, 36 L. ed. 761. 12 Sup Ct. Rep. 84."

After a careful search, we have been unable to find a single case holding contrary to or even qualifying the rule that the Federal Courts will always conform their decisions to those of the State Courts, and will follow the decisions of the State Courts, where those courts have, by a settled course of decisions, established rules of property affecting land titles. We have carefully examined all of the cases cited by counsel for Petitioners, and none of those cases conflict with or qualify this rule. Such of those cases cited by counsel for Petitioners as touch upon or speak of this rule expressly recognize it.

Counsel for petitioners cited a number of cases, including Burgess v. Seligman, 107 U. S. 20, and Kuhn v. Fairmount Coal Co. 215 U. S. 349, in support of his contention that the Federal Courts should exercise their independent judgment in the case at bar and refuse to follow the settled course of decisions of the Supreme Court of Mississippi construing this statute and holding that the Pearl River Imrovement & Navigation Company title are void, and establishing a rule of real property governing all titles derived through patents issued to said company.

We have carefully examined all of these authorities cited by counsel, and none of these cases support his contention. Nor do they conflict with the well established rule that the Federal Courts will conform their decisions to the decisions of the State Court establishing rules of real property, especially in a case, such as the case at bar, where the title to the property is dependent upon a state statute, the construction of which by the state court has established the rule of property.

In this connection, we direct the attention of the court to the fact that none of these cases cited by counsel was concerning real property except Kuhn V. Fairmount Coal Co., and that case did not involve the title to land, and the contract there involved was not dependent for its validity upon the construction of a state statute by the

Court. It is to be furthr observed that in the case of Kuhn v. Fairmount Coal Co., the majority opinion held that if there had been a settled course of decisions by the State Court on the subject they would have felt constrained to follow the State decisions; and that, in a vigorous dissenting opinion in that case by **Mr. Justice Holmes, in which Mr. Justice White** and **Mr. Justice McKennon** concurred, it was stoutly contended that even one decision by the State Court in that kind of case, by nature and necessity peculiarly local, ought to bind the court to follow the decision of the state court and to refuse to exercise their independent judgment.

But counsel for petitioners contend that this Court should refuse to follow the decisions of the Supreme Court of Mississippi, beginning with Hardy vs. Hartman, supra, decided in 1888, declaring this rule of property with reference to these Pearl River Improvement & Navigation Company titles; and counsel say that this Court ought, instead to follow the decision of the Circuit Court of Appeals in the case of **Southern Pine Company v. Hall,** 105 Fed. 84, rendered in 1900, which counsel for petitioners says established a rule of property governing said titles. We do not consider the case of **Southern Pine Company v. Hall, supra,** as being in conflict with the unbroken line of decisions of the Supreme Court of Mississippi establishing as a rule of property that all titles claimed under patents issued to Pearl River Imrovement & Navigation Company under the aforesaid statute are void for the reason that this Hall case was tried on an agreed statement of facts, which submitted to the Federal Court and invited its **independent judgment** upon the question of whether the instrument purporting to be the bond of the Pearl River Improvement & Navigation Company was the bond required by the statute, and whether title passed by the issuance of the patent to the Pearl River Improvement & Navigation Company. This is shown by the following quotation from the agreed statement of facts set out at page 86 of 105 Federal Reporter.

"the purpose being to submit to the Court the question whether or not, under all the facts above recited, and the law in reference thereto said bond was the bond required by said act, whether title passed by the issuance of said patent."

From this it is seen that the parties not only agreed that the Federal Court should exercise its independent judgment in that case, but invited the Court to exercise its independent judgment and disregard the decisions of the State Court. In other words, instead of invoking and relying upon the case of **Hardy v. Hartman** as a rule of property, the complainant in this Hall case submitted to the Federal Court the question of the validity of the bond and the patent, to be decided upon the independnt judgment of that Court.

But, if the case of **Southern Pine Company v. Hall, supra,** could be considered as being in conflict with this settled line of decisions of the State Court, we respectfully submit, under the authority of **Green v. Neal,** 6 Peters 291, (8 L. ed. 402) and **Suydam v. Williamson,** 24 How 427 (16 L. ed. 742), and **Wade v. Travis County,** 174 U. S. 508 (43 L. ed. 1064), that it was the duty of the Circuit Court of Appeals to disregard its former decision in the case of **Southern Pine Company v. Hall, supra,** and conform its decision in the case at bar to the decisions of the Supreme Court of Mississippi in **Hardy v. Hartman, supra,** and in **Becker v. Columbia Bank, supra,** and in **Edward Hines Yellow Pine Trustees v. State, ex rel. Moore supra,** establishing this rule of property.

The most that counsel for petitioners claims for the case of Southern Pine Comany v. Hall, supra, is that the Federal Court decided therein that the bond in question was the bond required by the statute, and in consequence of such holding that the court reached the conclusion that the patent was valid. Counsel contends, however, that the said decision established a rule of property govern-

ing the title to the lands. On the other hand, Counsel freely admits that in the case of **Hardy v. Hartman, supra,** the State Court decided that the same bond was not the bond required by the statute, and in consequence of such holding that the court reached the conclusion that the patent was void. Notwithstanding this, counsel still contends that the State Court decision did not establish a rule of property governing the title to said lands, although the State Court decision was on precisely the same question as that of the Federal Court and was more than twelve years prior in point of time to that of the Federal Court. We fail to see the logic of this argument. To contend that the Federal Court decision established a rule of property is to concede that the State Court decision established a rule of property. If it is conceded that the State Court decision established a rule of property governing the title to these lands in the case of **Hardy v. Hartman supra,** in 1888; then it follows, necessarily, that the Federal Court could not establish a different rule of property governing the title to these same lands twelve years later in the case of **Southern Pine Company v. Hall,** supr For this additional reason we submit that the Circuit Court of Appeals did not commit error in the case at bar when it disregarded the decision in **Southern Pine Company** v. **Hall, supra,** and followed the rule of property established by the State Court in **Hardy v. Hartman, supra**

The statement is made in the brief of counsel for petitioners that no patent was shown to have issued to the Pearl River Improvement & Navigation Company in the case of Hardy v. Hartman, supra. We desire to take issue with counsel on this statement and call the attention of the court to the following statement of the facts contained in the report of that case appearing in 65 Miss. 505, which statement of facts is as follows:

> "The plaintiff, in support of his claim of title, put in evidence a patent from the State to himself, dated October 1, 1885, and

conveying the land sued for.

> And the defendants, in defence of their claim of title, adduced in evidence, as the bill of exceptions recites, 'A certified copy taken from the records of the office of the Swamp Land Commissioner of the State, showing that the lands in controversy were sold to the Pearl River Improvement & Navigation Company on the 8th day of April 1871, by an act approved April 8, 1871, and that a patent issued to said company for the lands in controversy, June 27th, 1871, which copy was in due and regular form and properly authenticated and certified.' The defendants also introduced in evidence a certified copy of the list of lands in Lincoln County sold to the State for the taxes of 1874, and a certified copy of the list of lands in that county sold to the State on the 10th of May, 1875, under the abatement Act; and each of said lists embraced the land in controversy. Then the defendants introduced in evidence a deed from the Auditor of Public Accounts, dated March 13th., 1877, and conveying this land to them."

The certified copy taken from the records of the office of the Swamp Land Commissioner of the State referred to above, and showing that the land in that case had been patented to Pearl River Improvement & Navigation Company on June 27, 1871, was introduced in evodence under Section 1625 Revised Code of Mississippi 1880, which was in force at the time of the decision in the Hardy-Hartman case. Said Code Section reads as follows:

> "Copies from the Books of entries of land, kept in any land office in the state. or in the office of the secretary of state, or other public officer, when certified by the officer having charge thereof, shall be admissible in evidence in the same manner and with the same effect as the original certificate of entry."

The Supreme Court of Mississippi in the case of Boddie v. Pardee, 74 Miss. 13, (20 South. 1), held that under this Section certified copies from the books of entries in the office of the Land Commissioner showing the issuance of patents are original evidence and admissable in the same manner and with the same effect as the original patent.

From the foregoing it therefore conclusively appears that proof was made in that case that a patent was issued to the Pearl River Improvement & Navigation Company. And from the foregoing it further appears that the theory of the defendant Hartman in that case was that title to said land had passed out of the State of Mississippi to the Pearl River Improvement & Navigation Company by said patent and that by the sale of said land to the State of Mississippi for taxes in the year 1875, and by the sale of said land by the State to him under the auditor's deed of March 13, 1877, he was the owner thereof. So that, it not only appears that a patent was shown to have issued to the Pearl River Improvement & Navigation Company in that case, but it conclusively appears from the opinion in that case that the court held the title claimed by the defendant Hartman under the Pearl River Improvement & Navigation Company patent was void because the bond filed in the office of the Secretary of State was not the bond of the Pearl River Improvement & Navigation Company and did not meet the requirements of the Statute.

It will also be noted that the court in the Hardy-Hartman case held that the Act of 1871 did not of itself divest the state of title to the land; but, on the contrary, said Act expressly provided that the patents to the lands should not be issued by the State to the Company until the Company should file in the office of the secretary of state a bond, with security, in the sum of $50,000.00, and that the bond should be approved by the governor. The Court further held in that case that the giving of the bond required by the statute was a condition precedent, and that a patent issued without the company complying with this condition precedent could pass no title to the Company.

In this connection we call the attention of the court to paragraph 12 of the agreed statement of facts in the case at bar, (R. 70), wherein it is agreed that there is neither any bond nor any evidence of the filing of any bond required by the Act of April 8, 1871, on file in the office of secretary of state; but that there was at one time a bond on file in the office of the secretary of state purporting to be the bond repuired by Act of 1871, which is the same bond referred to and set out in the case of Hardy v. Hartman, 65 Miss. 505, and also referred to in Becker v. Columbia Bank, and also referred to in Southern Pine Company v. Hall. We also call the attention of the court to paragraph 11 of the agreed statement of facts (R. 70) wherein it is agreed that the patent to Pearl River Improvement & Navigation Company offered in evidence by complaint in this case is the same patent which was involved in the case of Becker v. Columbia Bank, supra.

We therefore respectfully submit that since the bond before the court in this case is the indentical bond that was before the court in Hardy v. Hartman and Becker v. Columbia Bank; and since the Supreme Court of the State of Mississippi held in those two cases that patents

issued to the Pearl River Improvement & Navigation Company were void because said bond was not the bond required by the statute; and since the Supreme Court of the State of Mississippi held in Becker v. Columbia Bank, supra, and in Edward Hines Yellow Pine Trustees v. State Ex. Rel. Moore,, supra, that the decision in the case of Hardy v. Hartman, established a rule of property governing all such titles; we respectfully submit that the title of the petitioner in this case is identical with the title of the defendant Hartman in the case of Hardy v. Hartman, supra, and with the title of Becker in the case of Becker v. Columbia Bank, supra, and is controlled by the rule of property which was established by the Supreme Court of the State of Mississippi in those cases.

Counsel for petitioner makes the following statement in his brief: "It will further appear by reference to the Hall case supra, and the deraignment of title that Olivia B. Hall owned the land at the time the Hall case was decided by the Circuit Court of Appeals. The bill of complaint charges that she owned it, and that it was by inadvertance that the lands were omitted from the bill of complaint in that suit." From this statement counsel makes the argument that the decision in the case of Southern Pine Company v. Hall, supra, validated the title of Olivia B. Hall to the land involved in the case at bar; and that it was upon the faith and credit of the decision of the Circuit Court of Appeals in the Hall case that petitioners purchased the land here involved. By reference to the four bills filed by petitioners in the case at bar, (R. 2, 9, 16, 23) is seen the following allegations with reference to the ownership of the land involved herein: "Thereafter on July 23, 1900, the said Olivia B. Hall by quitclaim deed conveyed said land to Charlotte H. Eastman, the said deed being in conveyance of a theretofore executed but unrecorded deed from the said Israel Hall to Charlotte H. Eastman, wife of Sidney C. Eastman, said deed being executed about the year 1887, and the deed of con-

veyance from the said Olivia B. Hall to Charlotte H. Eastman being found of record in Book 12 pp. 222, record of Deeds, Pearl River County, State of Mississippi."

From this allegation, which is an admission by petitioners on the record in this case it appears that Olivia B. Hall never owned the Pearl River Improvement & Navigation Company title to the land involved in this case; that Charlotte H. Eastman acquired this title in 1887, and owned it at the time the decision was rendered in the case of Southern Pine Company v. Hall, supra, which decision was rendered by the District Court February 20, 1899, and affirmed by the Circuit Court of Appeals for the Fifth Circuit November 20, 1900.

We also call the attention of the court to the answers of the several defendants denying that the land in that suit was left out of the case of Southern Pine Company v. Hall by mistake (R. 31, 41, 50, 59); and to the fact that no evidence was offered by the complainant to prove that said land was left out of the Hall case by mistake. We also call the attention of the court to the further fact that in the Hall case Southern Pine Company was the complainant and Olivia B. Hall the defendant. It is apparent therefore that if the lands involved in this suit was left out of that suit it was left out by Southern Pine Company, complainant in that suit and not by the defendant Hall. So that it also appears from the record in the case at bar that the land involved in this suit was not left out of the Hall case by Olivia B. Hall, defendant in that case, through mistake.

(b) RULE ANNOUNCED IN TYNES V. SOUTHERN PINE COMPANY, 100 MISS. 129, ESTABLISHED A RULE OF PROPERTY.

In the case of Tynes v. Southern Pine Company, 100 Miss. 129, the Supreme Court of Mississippi pass-

ed upon a patent issued to the Pearl River Imrovement & Navigation Company under this same Act of April 8 1871, (Mississippi Laws 1871, 482, 486), and brought under review Section 6 Article 8, of the Constitution of Mississippi of 1868, (Ratified December 1, 1869), which provides: That there shall be established a common school fund, which shall consist of the proceeds of the lands now belonging to the State, heretofore granted by the United States, and of the land known as 'swamp lands,' except the land lying and situated on Pearl River, in the Counties of Hancock, Marion, Lawrence, Simpson and Copiah," and held that the patent was void as to the lands involved in that case because they were not lands "lying and situated on **Pearl River.**" In passing upon this patent in that case the court held that there the Legislature was without authority to authorize the issuance of a patent to the Pearl River Improvement & Navigation Company (which was a donation) for any lands which were not "lying and situated on **Pearl River,**" for the reason that Section 6 Article 8, Constitution of 1868 (ratified December 1, 1869) had set aside to be sold for school purposes all swamp land "except the swamp lands lying and situated on **Pear River** in the Counties of Hancosk, Marion, Lawrence, Simpson and Copiah."

In the case at bar, each defendant averred in his answer that the lands here involved are neither on nor near Pearl River, but are remotely situated therefrom, (R. 31, 45, 54, 63); and by the agreed statement of facts (R. 68 paragraph 7) it is admitted that the lands are not in the Pearl River watershed and not affected by the water of Pearl River, and are located about twenty miles East of Pearl River and on Wolf River, an independent river system from that of Pearl River.

We respectfully submit that in this state of the pleadings and proof, and with this admission contained in the agreed statement of facts, petitioners in the case at bar

brought their title clearly within the condemnation of this Tynes case; and respondents are entitled to and do rely on that case as a rule of property established by the State Court, in the construction by that Court of the Constitution of the State of Mississippi.

PETITIONERS NOT IN POSITION TO RELY UPON CHAPTER 114 OF LAWS OF MISSISSIPPI OF 1875 AS RATIFYING THEIR TITLE.

It is claimed by petitioners that this Court should review and reverse the decision of the Circuit Court of Appeals because they say now, and for the first time in this Court, that their title to the lands involved was approved and ratified by the Legislature of the State of Mississippi by an Act, Chapter 114 of the Laws of Mississippi, approved April 19, 1873. This Act is set out in full in appendix "C" to the petition for certiorari herein, at pages 35, 36 and 37 thereof.

This is a private Act of the Legislature. It was not pleaded, proven nor relied on in the trial Court; it was not raised nor relied on before the Circuit Court of Appeals; and it is first pleaded, proven, raised and relied on in this court, on petition for certiorari and as a ground for asking this Court to review the case on certiorari and reverse the same.

Manifestly petitioners are seeking to have this Court take judicial notice of this private Act of the Legislature pleaded and relied on for the first time by them in their petition for certiorari. This Court is a Court of review. It will not permit litigants to frame their pleadings and offer their proof for the first time on an application for certiorari to review the case, or upon a review of the case on certiorari; neither will the Court make petitioners' case other than they made it in the District Court by tak-

ing judicial notice of a private Act of the Legislature which petitioners did not choose to rely on in their pleadings nor to prove on the hearing. If this Court could or would in any case take judicial notice of a private Act of the Legislature of a State, the pleadings of the party relying upon it would have to present the same before resort would be had to judicial knowledge by the Court. Mining Co. v. McFadden, 180 U. S. 533, 45 L. Ed. 656; Oregon S. L. & W. N. R. Co. v. Skottowe, 162 U. S. 490, 40 L. Ed. 1048. In Mining Co. v. McFadden, supra, this Court said:

> "But the Circuit Court would not make plaintiff's case other than they make it by taking judicial notice of facts which they did not choose to rely on in their pleadings, The averment brought no controversy in this regard into count, in respect of which resort might be had to judicial knowledge. Thayer Treatise on Evidence, ch. VII; Oregon S. L. & W. N. R. Co., v. Skottowe, 162 U. S. 490, 40 L. Ed. 1048, 16 Sup. Ct. Rep. 869."

In this connection we also call to the attention of the Court that by the agreed statement of facts (R. 67 paragraph 2) petitioners have agreed that the validity of their title is entirely dependent upon the patent issued to Pearl River Improvement & Navigation Company under the Act of April 8, 1871, set out as appendix "B" to the petition for certiorari; and by paragraph 14 of the agreed statement of facts (R. 70) petitioners agree that the pleadings and the agreed statement of facts constitutes the record in this case.

We respectfully submit, therefore, that we are not called upon now to meet an issue raised by petitioners for the first time in this Court on their application for certiorari, an issue which they did not choose to make and

rely upon in the District Court and in the Circuit Court of Appeals.

THE ACT OF 1873 DID NOT DEAL WITH TWO CLASSES OF LANDS AND DID NOT RATIFY TITLES TO ANY LANDS PATENTED TO PEARL RIVER IMPROVEMENT & NAVIGATION COMPANY, THE PAYMENT OF TWENTY-FIVE CENTS PER ACRE BEING A CONDITION PRECEDENT TO SUCH RATIFICATION.

As we have heretofore stated we are not called upon and should not be required now to meet an issue raised by petitioners for the first time in this Court on their application for certiorari. But since petitioners have raised this issue and presented it with much vigor in their brief, in order that we may not be placed in the attitude of admitting that petitioners' statements on this issue are correct, we presume that it is proper for us to make reply thereto, even though so to do may require us to follow counsel for petitioners out of the record.

Petitioners say the said Act of 1873, set out as Exhibit "C" to petition for certiorari herein, dealt with two classes of land designated by petitioners as follows: (a) those lands at that time still owned by the Pearl River Improvement & Navigation Co., and (b) those lands which at that time had been deeded away by the company. After having said this, counsel for petitioners further says that the case of Hardy v. Hartman supra, and the case of Becker v. Columbia Bank supra, dealt with lands designated by counsel as class (a), and that the Supreme Court of Mississippi has never had before it or passed upon the question of the validity of the title to lands conveyed by the Pearl River Improvement & Navigation Company prior to the said Act of 1873 and falling within what counsel designates as class (b) of the lands. Counsel then says that the case of Southern Pine Company v. Hall, supra, was dealing with the class of lands falling within the

class designated by him as class (b); and that the lands involved in this suit also fall within the class designated by him as class (b).

There is nothing in the record in the case at bar, and there is nothing contained in the cases of Hardy v. Hartman, supra, and Becker v. Columbia Bank, supra, as they appear reported in the official State Reports, to warrant the statement by counsel for petitioners that the Supreme Court of Mississippi, in those cases, was dealing with lands that had not been conveyed by Pearl River Improvement & Navigation Company prior to the enactment of said Act of 1873. Not only this, but there is nothing in the report of said cases and there is nothing in the record in the case at bar from which any such conclusion can be drawn. To the contrary, as we shall now undertake to point out to the Court, the Pearl River Improvement & Navigation Company owned none of the lands patented to it by the State to fall within the class of lands designated by counsel as class (a) at the time of the enactment of said Act of 1873, but said company had sold to M. S. Baldwin in 1872, all lands which were patented to it by the state, and that the lands in both the cases of Hardy v. Hartman, supra, and Becker v. Columbia Bank, supra, were lands which had been sold by the company prior to the enactment of said Act of 1873.

In this connection, we direct the attention of the Court to the agreed statement of facts in the case at bar (R. 70, paragraph 11) wherein it is agreed that the patent to the Pearl River Improvement & Navigation Company offered in evidence by complainant and attached to the agreed statement of facts is the **same patent** which was involved in the case of **Southern Pine Company v. Hall, supra,** and is the **same patent** which was involved in the case of **Becker v. Columbia Bank, supra.** We direct the attention of the Court to the fact that this patent is the patent dated **June 27, 1871.** (R. 71, 72). We direct the

attention of the Court to the case of **Bradford v. Hall,** 86 Fed. 802, 803, wherein Judge **Hill** of the District Court, who presided in that case, made the following statement in the course of the opinion with reference to said patent of **June 27, 1871,** and to the disposition of the lands therein embraced:

> "On the 11th day of June, 1871, and on the 27th day of June, 1871, patents were issued, signed by the governor and secretary of state, under the seal of the state, conveying, among many other lands, the lands in controversy to the Pearl River Improvement & Navigation Company and on the 21st day of November, 1872, a deed, or what purports to be such was executed by Samuel A. Vose, as the president of said navigation company, for **all** of said lands described in the two patents aforesaid, to **M. S. Baldwin,** for the recited consideration of **$11,000.**"

From the foregoing quotations from Bradford v. Hall, supra, it appears that Pearl River Improvement & Navigation Company conveyed to M. S. Baldwin in **November, 1872,** and prior to the enactment of the Act of 1873, **all** of the lands embraced in the patent from the State to Pearl River Improvement & Navigation Company dated **June 27, 1871.** From the agreed statement of facts in the case at bar (R.70, paragraph 11), it appears that it is agreed in the case at bar that this **June 27, 1871,** patent is the patent which was involved in both cases of Southern Pine Company v. Hall, supra, and Becker v. Columbia Bank, supra; and that this patent is the same patent offered in evidence and relied on by petitioners in the case at bar. Now Judge **Hill** said in Bradford v. Hall, supra, that the navigation company conveyed to M. S. Baldwin in **November, 1872, all** of the lands described in said patent of **June 27, 1871.**

So that, assuming that the record in Bradford v. Hall, supra, supports this statement therein by Judge Hill, and since it is agreed in the record in the case at bar that this June 27, 1871, patent as set out in the record is the same patent as that in Southern Pine Company v. Hall, supra, and in Becker v. Columbia Bank, supra; it conclusively appears, or is made to appear, that the Supreme Court of Mississippi dealt with identically the same class of lands, those conveyed by the company before the enactment of said acts of 1873,—in Becker vs. Columbia Bank, supra, as did the Federal Court in the case of Southern Pine Company v. Hall, supra and as this Court is called upon to deal with in the case at bar. And, thus it has been made to appear by the record in the case at bar, read and considered in the light of the said case of Bradford v. Hall, supra that counsel for petitioners is mistaken when he says that the Supreme Court of Mississippi, in Becker v. Columbia Bank supra, was dealing with a class of lands differently situated from the lands involved in the case of Southern Pine Company v. Hall, supra, and those lands involved in the case at bar, and that counsel is mistaken when he says that in said case of Becker v. Columbia Bank the lands had not been conveyed by the Company prior to the enactment of said Act of 1873.

In this connection, we direct the attention of the Court, if it is proper for us to do this, to the deposition of M. S. Baldwin which is set out in the original trascript of the record from the Circuit Court of Appeals in the case of Southern Pine Company vs. Hall, supra, trasmitted to this Court along with the petition for writ of certiorari from this Court to said Circuit Court of Appeals in that case, which writ of certiorari was denied by this Court by memorandum decision in the case styled Southern Pine Company v. Hall, 180 U. S. 639; which deposition shows (Top page 21 of record of the Circuit Court of Appeals in said case) that M. S. Baldwin purchased all the Pearl River Improvement Company lands, and which deposition

shows (middle page 24 of the record of the Circuit Court of Appeals in said case) that Baldwin negotiated for said lands in **1872,** and purchased the same about **sixty** days after beginning said negotiations.

If petitioners had pleaded in the lower Court that the Act of 1873 ratified and confirmed their title on the theory, as now claimed, that the Act provided and dealt with the lands in two classes, and that the lands involved in the cases of Hardy v. Hartman, supra, and Becker v. Columbia Bank, supra, fall within the class designated by counsel as class (a), or lands not theretofore sold by the Company; and that the lands involved in the case at bar and those lands involved in the case of Southern Pine Company v, Hall, supra, fall within the class designated by counsel as class (b), or lands which had th[illegible] been sold by the Company; then we would have had an opportunity to meet this on the trial of the case in the District Court under proper pleadings and proof. We would have had an oportunity to show by authenticated copies of the records before the Supreme Court of Mississippi in Hardy v. Hartman, supra, and in Becker v. Columbia Bank, supra, and by authenticated copies from the land deed records of the counties wherein the lands involved in those two cases are situated that the lands involved in said cases were sold and conveyed by Pearl River Improvement & Navigation Company to M. S. Baldwin in November, 1872. Moreover, we would have had an opportunity to show by such records that the claimant of the lands in Becker v. Columbia Bank, supra, pleaded and proved his Pearl River Improvement & Navigation title, including the patent to Pearl River Improvement & Navigation Company and a deed from said company to said Baldwin dated November 20, 1872, conveying the lands involved in said case to said Baldwin; and also that said claimant pleaded and offered in evidence in that case the said Act of 1873, which is set out as Exhibit "C" to the petition for certiorari herein.

THE ACT OF 1873 HAS BEEN BEFORE THE SUPREME COURT OF MISSISSIPPI AND BEFORE THE FEDERAL COURT, AND IS NOT NOW PRESENTED TO A COURT FOR THE FIRST TIME.

In the case of Becker v. Columbia Bank, supra, not only did defendant plead and prove the Pearl River Improvement & Navigation Company title, including the patent to said company, and a deed from said company to M. S. Baldwin dated November 20, 1872, conveying to him the lands involved in that case; but also pleaded and offered in evidence said Act of 1873 as a ratification of his title to the lands involved in that case. And yet the Supreme Court of Mississippi in that case, with this same title and this same Act pleaded and proven by defendant in the trial Court, declared the decision in the case of Hardy v. Hartman, supra, to be a rule of property as to all Pearl River Improvement & Navigation Company titles. Not only was this Act before the Supreme Court of Mississippi in Becker v. Columbia Bank, supra; but in the case of Edward Hines Yellow Pine Trustees v. F. C. Martin, reported in Vol. 99 page 825 Southern Reporter, but not reported in the official State Reports, this Act of 1873 was presented and relied on by the appellants in that case, who are the petitioners in the case at bar, as a ratification of their Pearl River Improvement & Navigation Company title through which they claim in the case at bar. This Act of 1873 was presented and relied on as a ratification of the Pearl River Improvement & Navigation Company title in that case by the same attorney who represents petitioners before this Court in the case at bar; and the same argument was made in that case that is being here made in the case at bar. In the case of Edward Hines Yellow Pine Trustees v. F. C. Martin supra, the Supreme Court of Mississippi, by affirming **per curiam** the judgment of the lower court, held that the Pearl River Improvement & Navigation Company title was void in that case, and that the same was not ratified by the Act

of 1873. There is no statement of the facts set out in the report of that case, but only a memorandum affirmance **per curiam.** The report does show, however, that a suggestion of error was filed in that case and was overruled on May 12, 1924; and the report shows, moreover, the attorneys who represented appellants in that case are the same who represent petitioners in the case at bar. The attorneys who filed that suggestion of error, and the Court which overruled the same knew at the time what was contained in the record in that case and what was presented for consideration of the Court by the suggestion of error; and by reference to the original records in Hardy v. Hartman, supra, and Becker v. Columbia Bank, supra, in the archives of the Supreme Court of Mississippi they knew or could have known what was contained in and presented by those cases. In this connection, and in the light of what is actually shown by the report of the case of Edward Hines Yellow Pine Trustees v. F. C. Martin, supra, taken in connection with the fact that the Supreme Court of Mississippi could know in that case, in considering the suggestion of error, by reference to their archives what is shown by the record in said cases of Hardy v. Hartman and Becker v. Columbia Bank, we direct the attention of the Court to a statement made by counsel for petitioners in their brief (page 12) wherein they say the case of Southern Pine Company v. Hall, supra, is the **only** case in **any court** that has ever passed upon the title to lands situated and classified as are the lands involved in the case at bar, which statement is made by counsel in connection with his further statement that in the cases of Hardy v. Hartman, supra, and Becker v. Columbia Bank, supra, the Supreme Court of Mississippi was dealing with lands patented to Pearl River Improvement & Navigation Company and not conveyed by it prior to the enactment of said Act of 1873, and that in the case of Southern Pine Company v. Hall, supra, the Circuit Court of Appeals was dealing with lands which had been conveyed by said Com-

pany prior to the enactment of said Act of 1873. As heretofore pointed out to the Court, there is nothing in the record in the case at bar, and there is nothing contained in the cases of Hardy v. Hartman, supra, and Becker v. Columbia Bank, supra, and Edward Hines Yellow Pine Trustees v. F. C. Martin, supra, as those cases appear reported in the reports, to warrant either of said statements. The true facts in each case will be reflected by the original transcript thereof now in the archieves of the Supreme Court of Mississippi, which records were, as said, available to that Court when they passed upon the suggestion of error in Edward Hines Yellow Pine Trustees v. F. C. Martin, supra. We do not know whether this Court would permit us to show by authenticated copies taken from those records what the true facts are, by way of answer to the aforesaid statement by counsel for petitioners which they have gone out of the record in the case at bar to make. However, we have had printed under separate cover authenticated copies of records taken from Becker v. Columbia Bank, supra, and from Edward Hines Yellow Pine Trustees v. F. C. Martin, supra, which show the true facts in these respects, and which we will, if permitted by the Court on the hearing of this case, or if the information is desired in this case by this Court, file in this case as an exhibit to this brief.

CONCLUSION

The agreed statement of facts in the case at bar (R. 69, paragraph 9) admits that in that part of Marion and Hancock counties lying south of the 31st parallel, (which territory embraces the whole of Pearl River and Hancock counties at this time), all lands which were patented to the Pearl River Improvement & Navigation Company under the Act of April 8, 1871, creating said company, were afterwards **"held"** by the state and patented to divers persons under the general laws providing for the

disposal of the swamp lands. The word **"held"** is a misprint in the transcript; the word used in the agreement is **"sold."** It thus appears that out of the five original counties embraced in the Act of 1871, it is admitted in this record that in at least two counties (Hancock and Pearl River) conflicting titles have been issued by the State of Mississippi on all lands patented to Pearl River Improvement & Navigation Company. In fact conflicting patents have been issued to all of the more than 100,000 acres of lands patented to Pearl River Improvement & Navigation Company. Such of these titles as have been litigated in the state court have consistently resulted in the upholding of the second patents, and the cancellation of the prior patent to Pearl River Improvement & Navigation Comany; and such will be the result of every case tried in the state court wherein these conflicting titles are litigated. There is but one case, Southern Pine Company v. Hall, supra, in which litigation on these conflicting titles resulted in the upholding of the old patent. That case, however, was tried upon an agreed statement of facts by which, as heretofore said, we consider the parties submitted to and invited the independent judgment of the Federal Court on the title; and that case involved only a few thousand acres of these lands.

If this Court in this case does not yield to the settled course of decisions by the State Court fixing a rule of property governing this Pearl River Improvement & Navigation Company title, but instead, holds that the said title is valid, we will then have in Mississippi many thousands of acres of land the conflicting title to which, if claimed by residents of the same state, is to be settled in the State Court by one rule and in favor of the junior patent, and the conflicting title to which, if claimed by residents of different states, is to be settled in the Federal Court by a different rule and in favor of the senior patent. In other words, we will have the anomolous situation in Mississippi that a title resting upon the junior patent is

perfectly valid so long as the claimant under the senior patent is a resident of the same state as the claimant under the junior patent; but at once diversity of citizenship arises between these two claimants, their positions are reversed,—the junior patent is no longer valid, the senior patent is no longer void. We do not believe it is to be said of the two systems of judicial tribunals that a speculator, by the simple expediency of crossing the state line, may gamble with these titles and call upon one court to enforce as valid a claimed title which, before he crossed the state line, was worthless and could not be enforced by him in the other court which alone was open to him before he crossed the state line. We do not believe it was ever intended that there should arise under our State and Federal systems of jurisprudence such an incongruity in the administration of the laws governing land titles as would result in the courts of one or the other being used by speculative litigants in a game of hide and seek. No relief can be given a defeated litigant in the State Court, claiming under the Pearl River Improvement & Navigation Company title, by the United States Supreme Court on writ of error to the State Court. No Federal question would be presented in such case. Bacon v. Texas, 163 U. S. 207, 41 L. ed. 132, 16, Sup. Ct. Rep. 1023.

We think this Court must have had in mind just such a situation as that pictured above when, in the course of the opinion in Brine v. Hartford Fire Ins. Co., 96 U. S. 627 (24 L. ed. 858), when called upon to enforce a claimed right in land different from that of the settled law of Illinois, this Court said:

> "To do so is at once to introduce into the jurisprudence of the State of Illinois the discordant elements of a substantial right which is protected in one set of Courts and denied in the other, with no superior to decide which is right."

Principles of law of this kind do not descend to mere reported cases for authority, they ascend to the pinnacles of supreme justice for authority, and arise out of the necessity for the orderly administration of justice by the co-ordinate systems of judicial tribunals,—Federal and State,—peculiar to this Country.

We respectfully submit that the Circuit Court of Appeals decided this case correctly, and that the same should be affirmed by this Court.

Respectfully submitted,

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HATHORN & WILLIAMS,

Attorneys for Respondents.

We certify that we have, more than five days next before this case is set for hearing by the Court, delivered to Hon. T. J. Wills, one of the attorneys for petitioners, a copy of the foregoing brief.

WILLIAM H. WATKINS,
FLEET C. HATHORN,

Attorneys for Respondents.